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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

SUZANNE VENEZIA,
PETITIONER
V.

WILLIAM PENN SCHOOL DISTRICT,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Does a court of appeals lack the authority to consider an appeal filed within the time limits prescribed by the Federal Rules of Appellate Procedure and Congressional statute, 28 U.S.C. §2107(c), in the absence of a separate motion for an extension of time when a notice of appeal has been timely filed?

Does a court of appeals lack the authority to request a ruling from a lower court on the merits of the timeliness of an appeal, in the absence of a separate motion for an extension of time?

Does a court of appeals have the authority to dismiss an appeal for untimeliness when a timely filed notice of appeal is entered on the docket after the expiration of the time limit on which the Court then relies to subsequently dismiss the appeal, whereby depriving the Appellant, a priori, of any course of action?

Can a court of appeals disregard its own local rules of appellate procedure and written court instructions, and arbitrarily docket, issue, fail to issue or fail to timely issue notices to appellants which regard the initial docketing of an appeal and/or the dismissal of an appeal for lack of jurisdiction?

PARTIES TO THE PROCEEDING

The parties to this Action are set forth in this caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioner/Plaintiff respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the Third Circuit Court denying the Petition for Rehearing is available at Venezia v. William Penn School District, 1060 (3d Cir.2010) and is reproduced at Petitioner's Appendix ("App") at App. 2.

The Order of the Third Circuit dismissing the Petitioner's appeal for lack of jurisdiction is available at Venezia v. William Penn School District, 1060 (3d Cir.2010) and is reproduced at App. 4.

The District Court's Order denying of Motion to Reopen under 60 (c)(1) due to late filing is available at Venezia v. William Penn School District, 4713 (2006), U.S. District Court for the Eastern District of Pennsylvania and is reproduced at App.7.

The District Court's Order of dismissal of the Petitioner's complaint in District Court for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6) is available at Venezia v. William Penn School District, 4713 (2006), U.S. District Court for the Eastern District of Pennsylvania and is reproduced at App. 8.

STATEMENT OF JURISDICTION

The Court of Appeals for the Third Circuit issued its Order of Dismissal on 01/27/2010, App. 4. The Court of Appeals for the Third Circuit denied the Petitioner's timely filed Petition for Rehearing on 03/01/2010, App.2. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

U.S. Code Title 28 Part V Chapter 133 § 2107: Time for appeal to court of appeals

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds—

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced, the district court may, upon motion filed within 180 days after entry of the judgment or order or within 7 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

Federal Rule of Appellate Procedure, Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

Federal Rule of Appellate Procedure, Rule 4. Appeal as of Right – When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after

the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or

order—is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order

to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

CONCISE STATEMENT OF THE CASE

On 01/27/2010, the United States Court of Appeals for the Third Circuit dismissed the Petitioner's Appeal and wrote:

> Appellant seeks to appeal the District Court's 12/15/06, order dismissing her complaint and 08/19/09, order denying her motion to reopen the judgment. Appellant's notice of appeal was not filed until 12/18/09, beyond the applicable 30-day periods for filing an appeal. See FRAP 4(a)(1)(A). Because the time requirement for filing a notice of appeal is mandatory and jurisdictional, Appellant's appeal is dismissed for lack of jurisdiction. *Bowles v. Russell*, 551 U.S. 205, 209 (2007). Appellant is unable to satisfy the time requirements of Federal Rule of Appellate Procedure 4(a)(5) for extending the time to appeal. Although Appellant asserts that she timely filed her notice of appeal for purposes of Federal Rule of Appellate Procedure 4(a)(6), that rule requires the filing of a motion to reopen the time to appeal and the time to file such a motion has passed. See FRAP 4(a)(6); *Poole v. Family Court of New Castle County*, 368 F.3d 263, 267-68 (3d Cir. 2004). App. 4.

On 03/01/2010, the Third Circuit Court confirmed its dismissal and denied the Petitioner's Petition for Rehearing: "... no judge who concurred in the decision having asked for rehearing, and majority of the circuit judges ... not having voted for rehearing by the court en banc, the petition for rehearing is denied." App. 2.

Based on the majority understanding of the other circuit courts and on this Court's distinctions between "jurisdictional requirements" and "non-jurisdictional requirements", since the Petitioner's appeal was filed within the time requirements under Rule 4. of the Federal Rules of Appellate Procedure ("FRAP"), which this Court has ruled to be "jurisdictional", it was within the jurisdiction of the Third Circuit to accept the appeal.

This was not the case in *Bowles*[1] where this Court ruled that Bowles had made an untimely filing regardless of the argument presented that he had followed erroneous instructions from District Court. Consequently, the Third Circuit's reliance on *Bowles* to dismiss the instant case was a misapplication of this Court's ruling.

The decision in this case also runs contrary to the concerns raised specifically by the Advisory Committee in late 2009; during their meeting the Committee made no mention of *Poole*[2]; instead, it wrote, "It should also be noted that even if a court is inclined to apply the *Becker*[3] line of cases, those

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[1] Bowles v. Russell, 551 U.S. 205 (2007)

[2] Poole v. Family Court of New Castle County, 368 F.3d 263, 267-68 (3d Cir.2004)

[3] Becker V. Montgomery (00-6374) 532 U.S. 757 (2001)

cases can only rescue an appeal if some document has been timely filed that could be considered the substantial equivalent of the notice of appeal."[4] When reviewed under this Court's considerations in *Reed Elsevier*[5], the Third Circuit's very specific contention - that the separate filing of a motion under FRAP 4. is jurisdictional - is an untenable one. In *Reed*[6] this Court wrote : "In light of the important distinctions between jurisdictional prescriptions and claim-processing rules ..., we have encouraged federal courts and litigants to "facilitat[e]" clarity by using the term 'jurisdictional' only when it is apposite."

The Third Circuit's reliance on *Poole* in this case is a dangerous precedent; in the *Poole* case, although dismissed for lack of jurisdiction, that dismissal was also based on the many objections raised by the Third Circuit regarding Poole's defense – it plainly rejected Poole's explanations for his tardy apprisal of the lower court ruling and therefore, his tardy filing of his appeal. Many circuit courts and district courts have cited *Poole* in dismissing appeals, but none have done so *by relying exclusively on the absence of a motion.* Fortunately, these courts, in their respect and deference for the provisions of FRAP 4.(a)(6) – the last chance for bringing a just case to court - have

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[4] Draft of Minutes of Fall 2009 Meeting of Advisory Committee on Appellate Rules (November 5-6, 2009, Seattle, Washington),Amaya_Bassett@ao.uscourts.gov [mailto:Amaya_Bassett@ao.uscourts.gov]

[5] Reed Elsevier, Inc., Et Al. V. Muchnick, Irvin, Et Al., 103 S.C. (2008)

[6] Id.

last chance for bringing a just case to court - have always reviewed the circumstances of the cases before them, thus justly vesting themselves of jurisdiction.

In the instant case, the Third Circuit Court preferred to divest itself of this specific authority, while in its own Local Rules of Appellate Procedure, ***it retains it***:

> 3.4 Notice of Appeal in Pro Se Cases
>
> The court will deem a document filed by a pro se litigant after the decision of the district court in a civil, criminal, or habeas corpus case to be a notice of appeal despite informality in its form or title, if it evidences an intention to appeal. The court will deem an application for leave to appeal in forma pauperis or an application for a certificate of appealability to be a notice of appeal if no formal notice has been filed. The grant or denial of a certificate of appealability by the district court will not be treated as a notice of appeal.[7]

Based on the above, the Third Circuit retains jurisdiction on appealability motions in District Court for rulings on the merits or on compliance with specific rules. Even in the absence of a separate motion, why would a court of appeals be prohibited in doing so under FRAP 4. if it possessed the appellant's qualifying elements for a time

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[7] Local Rules of Appellate Procedure for the U.S. Court of Appeals for the Third Circuit

extension or the appellant's qualifying elements for a reopening of the time?

The Third Circuit Court has attempted to create a dragnet using *Poole* and *Bowles* as staffs to catch any wayward fish regardless of size or shape. This is not only harsh, but it erroneously deprives circuit courts of powers that Congress vested in them. This is no small matter, since when courts wrongly decline authority, just appeals are barred from litigation. One-half of the appeals filed in 2009 in circuit courts were dismissed on procedural grounds[8]. These are not the statistics of an effective appeals system.

I. Factual Background

Lower Courts

On 09/28/2006, the Petitioner, following the wrongful termination of her teaching contract by the Respondent, the William Penn School District, filed a civil complaint alleging wrongful termination, willful misconduct, retaliation, and due process violations.[9]

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[8] http://www.uscourts.gov U.S. Court Of Appeals - Judicial Caseload Profile – National Totals.

9 *Venezia v. William Penn School District*, 24694 (CP, Montgomery County, PA, 2006), *Venezia v. William Penn School District*, 4713 (2006), U.S. District Court for the Eastern District of Pennsylvania. The Respondent had terminated the Petitioner's teaching contract alleging egregious acts of misconduct which included cruelty to students and racism in disregard of due process and without presenting the testimony for her termination - testimony that it had allegedly received from students.

The Respondent moved to remove the case to District Court, and although the Petitioner filed a Response in Opposition to the Removal, the Common Pleas Court failed to respond to the Petitioner's docketed filing and the case was, in this manner, "removed" to District Court.

The Petitioner applied for and was granted electronic filing access in District Court; *however, in the absence of clarity from the courts, she continued to file all documents in both courts.*

On 12/15/2006, the District Court, on the Respondent's Motion for Dismissal, dismissed the Plaintiff's case with prejudice " ... Because Venezia has failed to state a claim for municipal liability and because Venezia has received due process, I will dismiss her Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)..." (Venezia v. William Penn School District, 24694 (CP, Montgomery County, PA, 2006).

After this dismissal, however, both courts continued to issue filings and accept those of the Petitioner and Respondent, lulling the Petitioner into believing that her case was still active. During this time of equittable tolling[10], these documents amounted to over 15 filings in a case which had already been dismissed:

1. Common Pleas Court: 12/18/2006, Rule to Show Cause. (*Venezia v. William Penn School*

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[10]Although the Order of denial issued by the District Court on 08/19/2009, tolled a one-year limitation, this period of time, however, in terms of duration, can also exceed one (1) year under a Rule 60 motion to reopen.

District, 24694 (CP, Montgomery County, PA, 2006)

2. Common Pleas Court: 01/26/2007, Order Sur Motion To Amend Complaint. Id.
3. Common Pleas Court: 06/16/2009, Notice of Proposed Termination. Id.
4. Petitioner: 08/05/2009, Statement of Intent to Proceed. *Venezia v. William Penn School District*, 24694 (CP, Montgomery County, PA, 2006; *Venezia v. William Penn School District*, 4713 (2006), U.S. District Court for the Eastern District of Pennsylvania.
5. Respondent: 08/11/2009, Letter to the Prothonotaries. Id.
6. District Court: 08/19/2009, Order denying the Petitioner's Motion to Reopen. (vide infra 15.) *Venezia v. William Penn School District*, 4713 (2006).
7. Petitioner: 08/28/2009, Petition for Response. Venezia v. William Penn School District, 24694 and 4713, supra.
8. Respondent: 09/02/2009, Response to the Petitioner's Petitions. Id. Although the Respondent had received the District Court's Order dated 08/19/2009, it made no mention of this in its Response. After issuing its Order of denial, the District Court *also* continued to accept the Plaintiff's filings and made no attempts to contact the Petitioner.
9. Petitioner: 11/13/2009, Memorandum for electronic filing in the Common Pleas Court Common Pleas Court. Id.

10. Common Pleas Court: Notification for Listing of Oral Argument, post-marked 11/13/2009. Id.
11. Petitioner: Letter to Judge Branca of the Common Pleas Court dated 11/22/2009, in which she confirms participation in the scheduled oral argument. Id.
12. Petitioner: 11/23/2009, Statement of Intent to Proceed. The Petitioner wrote "... the Plaintiff is within her right to ask not only that the judgment of Judge Sanchez[11] be vacated, but also that a judgment be issued in her favor...", Id.
13. Common Pleas Court: 12/01/2009, Scheduling of Oral Argument and Statement of Intent to Proceed. *Venezia v. William Penn School District,* 24694 and 4713, supra.
14. Common Pleas Court: 12/09/2009, Oral Argument. During the brief Oral Argument, Judge Thomas Branca, the presiding Judge, told the Petitioner that the documents she had filed in the Common Pleas Court were a "nullity"[12] and that any errors committed in her case were purely clerical, *even the Orders signed by judges.* Id.
15. Common Pleas Court: 12/09/2009, Oral Argument Held and Order of Dismissal issued, *Venezia v. William Penn School District*, 24694

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[11] Judge Juan Sanchez, issuing judge in District Court case *Venezia v. William Penn School District*, 4713 (2006), U.S. District Court for the Eastern District of Pennsylvania

[12] Transcript page 4, Line 23, Oral Argument held on 12/09/2009, Court of Common Pleas of Montgomery County, Civil No. 2006-24694.

and 4713, supra. During this Oral Argument the Petitioner received, for the first time, a copy of the Order of denial to reopen her case[13] which had been issued by the District Court on 08/19/2009. She received this Order directly from the hands of the Respondent.[14] Since the case was "terminated" in District Court, the Petitioner no longer received court filing notices electronically. The PACER docket report indicates that the District Court purportedly "emailed" this Order to the Petitioner on 08/21/2009[15].

Circuit Court

On 12/18/2009, the Plaintiff timely filed an appeal in the Third Circuit which was entered on

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[13] Although there were many procedural errors committed, the Petitioner advanced her case in both courts on substantive grounds which questioned the validity of that initial order.

[14] Also in her Petition for Rehearing, the Petitioner cited Federal Procedure: As per Federal Procedure, Practice pointer: A prevailing party may shorten the 180-day period by sending (and establishing proof of the receipt of) its own notice of entry of a judgment, as authorized by FRCP 77(d).[FN5] The Advisory Committee encourages prevailing parties to send their own notice in order to diminish the likelihood that a judge will accept a claim of nonreceipt in the face of evidence that notices were sent by both the clerk and the winning party.[FN6] (2A Fed. Proc., L. Ed. § 3:608 Federal Procedure, Lawyers Edition Database updated August 2009.

[15] Pacer Docket Report, *Venezia v. William Penn School District*, 4713 (2006), U.S. District Court for the Eastern District of Pennsylvania. Document # 16, entered 08/21/2009.

the docket only on 01/05/2010, 18 days after her appeal had been filed, and - as per the decision of the Third Circuit- after the time had passed for appealing under FRAP 4.

Neither the Federal Rules of Appellate Procedure, not the Local Rules of Appellate Procedure for the Third Circuit mandate the payment of filing fees before an appeal can be docketed. ***The Third Circuit, however, dismissed the instant case without any qualifications as to why the appeal was docketed at such a late date. It cannot use the excuse of late payment, since it accepted the payment after the time limits under FRAP 4. had already passed. At that point, it would have been impossible for the Petitioner, using the argument of the Third Circuit, to remedy any defects in her appeal.***

This type of practice is, at best, questionable, inviting confusion and creating malfeasance; in the instant case, is caused dismissal.

On 01/05/2010 the Petitioner received an informational letter[16] about the docketing of her appeal. This letter contained information for pro se ligitants:

> Jurisdictional Defects
>
> As a general rule, this Court can only hear appeals taken in a timely fashion from final

[16] Letter from Marcia Waldron, Clerk of Court, received on 01/05/2010

> orders of a district court or certain administrative agencies. All appeals are checked for possible jurisdictional problems. If there is a problem with your appeal, you will be sent a letter which indicates the rule or statue relevant to the jurisdictionl defect in your appeal. Parties will be given an opportunity to file written responses presenting arguments on the question of jurisdiction, These responses will be sent to the Court, which will decide whether to dismiss the appeal for lack of jurisdiction. [17]

In essence, the Petitioner had been sent a packet of information for no reason. Already, by that date - 01/05/2010 - the Petitioner, according to the argument used by the Third Circuit to dismiss her appeal, had no time to remedy any defects. On 01/09/2010, 4 days after the docketing of her appeal, the Petitioner received a letter from the Third Circuit in which it stated that her appeal:

> would be submitted to a panel for possible dismissal due to a jurisdictional defect... It appears that this Court may lack appellate jurisdiction for the following reasons (s): The notice of appeal in your civil case was not filed within the time prescribed by the Federal Rules of Appellate Procedure." [18]

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[17] Letter from Marcia Waldron, Clerk of Court, received on 01/05/2010

[18] Letter from Marcia Waldron, Clerk of Court, received on 01/09/2010

Once again, these letters were perfunctory, since according to the Third Circuit's dismissal, the time for remedy was well past. Notwithstanding, the Petitioner filed her Response on 01/09/2010 – that very same day - and provided the Third Circuit with the details of her apprisal of the District Court Order of 08/19/2009. At that point, even if the Petitioner had filed a motion, it would have been out-of-time. In her Response, she wrote:

> Since her [Petitioner's] filings were accepted by the District Court after that date [08/19/2009 – the date of the District Court Order], the Appellant [Petitioner] had no reason to suspect that any judgment had been issued in her case and thus continued to present her arguments to both Courts ... At the conclusion of the Oral Argument held on 12/09/2009 by Judge Branca in the Court of Common Pleas, the Judge requested that Jonathan Riba, (counsel for the Defendant) ... exhibit a copy of the order issued by Judge Sanchez on 08/21/2009. A copy of this order was then given to the Appellant [Petitioner] – this was the first time that she was apprised of its existence. [19]

In her Response, the Petitioner also stated that she accessed the PACER system from time to time. She further wrote that "... although not mandated by law, the Appellant [Petitioner] has filed every court document, other than those filed

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[19] Response to Possible Dismissal filed 01/09/2010, *Venezia v. William Penn School District*, 1060 (3d Cir 2010)

electronically, with a return receipt either through U.S. mail or Federal Express."[20] Regardless of the District Court's error in manner of service, purportedly by email[21], the Petitioner's explanation about not having received the District Court's order was never questioned or addressed in the Third Circuit's dismissal of this case.

On 01/27/2010, the Third Circuit Court issued its Order of dismissal citing lack of jurisdiction. App.4. In dismissing the instant case, the Third Circuit did not make any reference to the details of the Petitioner's appeal documentation.

Why did the Third Circuit enter this appeal on the docket only on 01/05/2010, *when according to its very own "judicial" standard of analysis, at that time of docketing it was no longer appealable under FRAP.4 since the Petitioner had not filed what the Third Circuit deemed a "jurisdictional requirement", and namely, a separate motion to reopen the time?*

Moreover, prior to forwarding her appeal to the Third Circuit through express mail on 12/17/2009, the Petitioner had made attempts to file her appeal electronically even before 12/17/2009, and had contacted the Third Circuit by telephone and by email.[22] It was the Third Circuit's practices that

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[20] Id

[21] Pacer Docket Report, *Venezia v. William Penn School District*, 4713 (2006), U.S. District Court for the Eastern District of Pennsylvania. Document # 16, entered 08/21/2009.

[22] Emails between Pacer, Third Circuit and Petitioner from 12/14/2009 to 01/04/2010. The emails confirm the pending electronic access registration of 12/13/2009. Authorization

were "dilatory" and not without consequence, since they created a "catch 22" situation.

On 03/01/2010, the Third Circuit Court filed its Order denying rehearing, and made no comments whatsoever on the merits of the Petitioner's Petition for Rehearing.

II. Proceedings Below

A. Lower Courts

- On 09/28/2006, the Petitioner filed her case in the Court of Common Pleas of Montgomery County, Pennsylvania.
- On 10/30/2006, the Petitioner's complaint was "defectively" removed to the United States District Court for the Eastern District of Pennsylvania.[23]
- On 12/15/2006, the District Court, on the Respondent's Motion for Dismissal, dismissed the Plaintiff's case with prejudice " ... Because Venezia has failed to state a claim for municipal liability and because Venezia has received due process, I will dismiss her Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6)..." App.8.

Between 12/15/2006 and 12/09/2009 both the District Court and the Common Pleas Court continued to accept the filings and issue the orders listed herein from both the Petitioner and the

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was not provided until 2010.

[23] While the Petitioner realizes that at this time any motion concerning "defective" removal would certainly be untimely, this detail is important in the review of the courts' procedural and substantive actions in this case.

Respondent. The instant case was presented, however, as an appeal from the Order of the District Court:

- On 08/19/2009, the District Court issued its Order denying the Petitioner's Motion to Reopen and wrote, "Venezia's Motion to Reopen is DENIED because it was received more than one year after a final judgment dated December 15, 2006, in violation of Federal Rule of Civil Procedure 60(c)(1). App.7.

B. Decision on Appeal

On 01/27/2010, the Third Circuit Court dismissed the Petitioner's Appeal for lack of jurisdiction. App. 4.

C. Denial of Rehearing

The Petitioner sought rehearing from this dismissal and filed her Petition for Rehearing on 02/09/2010. Although she provided ample support for her case, on 03/01/2010, the Third Circuit denied the Petition without any reference to its merits "... no judge who concurred in the decision having asked for rehearing, and majority of the circuit judges ... not having voted for rehearing by the court en banc, the petition for rehearing is denied." App. 2.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT WITH CONSIDERATIONS ON THIS COURT'S PRIOR GUIDANCE ON ASSIGNING JURISDICTIONAL VALUES TO RULES

With its dismissal of the instant case, the Third Circuit conferred upon all elements of FRAP 4., the designation of "jurisdictional"; and wrote only that a required motion had not been filed, citing *Poole* [24], and that the appeal was untimely, citing *Bowles* [25]. The Third Circuit cannot so simply render the filing of a separate motion "jurisdictional". It must provide an analysis of the case where there is no established rigid standard of review. The Third Circuit did nothing of the kind in the instant case. **This is not judicial efficiency, but an attempt to turn the courts of appeals into a lucrative claim-processing business where appeals are entered into the docket (whereby giving notice to the appellant of filing) only after the "jurisdictional" filing time limits have passed, and only after onerous filing fees have been paid. This is tantamount to one's selling a solution to a problem that one has created.**

Given that the Petitioner's appeal was timely, in its cursory ruling - *analysis not being required*

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[24] *Poole v. Family Court of New Castle County*, 368 F.3d 263, 267-68 (3d Cir.2004)

[25] *Bowles v. Russell*, 551 U.S. 205 (2007)

for a claim-processing jurisdictional matter - the Third Circuit misappropriately alligned the instant case with this Court's decision in *Bowles v. Russell*.[26] This Court's ruling in Bowles has, for the moment, settled the question of the juridictional nature of the time requirements in FRAP 4. In fact, among the circuit and district courts, *Bowles* is the standard of review for assessing time defects, and therefore, for conferring or denying jurisdiction.

In *Bowles* [27], this Court held that while Congress did not label the requirements of FRAP 4. as "jurisdictional", the time limitations in that rule are to be applied as such. In practice, this Court affirmed that regardless of any motion approved by a court for an extension/reopening of the time period for filing an appeal, the ultimate authority for granting such an appeal would be the specific time limitations set forth in each FRAP 4. provision based on the characteristics which best applied to an appellant's specific case. *Bowles* [28] was decided in 2007, but the words of the Ninth Circuit Circuit in 2002 in *Arai v. American Bryce Ranches Inc.*, 316 F.3d 1066 (9th Cir. 2003) find large acceptance today among the circuit courts:

> Rule 4 (a)(6) was adopted to harshen penalty of losing one's right to appeal due to the government's malfeasance in failing to notify a party of a judgment, not to limit a party's statutory right to appeal the district court's

[26] *Bowles v. Russell*, 551 U.S. 205 (2007)
[27] Id.
[28] Id

> final decision on the merits... We need not decide what factor the court ultimately may utilize in denying a Rule 4 (a)(6) motion. ***Necessarily, the court can consider some factors outside the requirements of Rule 4 (a) (6) as the court's discretion extends beyond the technical requirements of the rule..."***

This Court's decision in *Bowles* conferred on FRAP 4. a "jurisdictional" characterization with regard to *time limitations*, but not in regard to the other aspects of the rule.

Malfeasance by litigants or the courts can never to checked entirely. In *Arai* [29], the Ninth Circuit ".. decline[d] to ascribe such an intention [one of malfeasance] to the drafters of the Rules of Appellate Procedure.." Since all courts must attain to this fundamental understanding of the intentions of the Appellate Rules, what intention could be assigned to the Third Circuit's ruling in the instant case to further limit FRAP 4. with rigid jurisdictional constraints, declining to review the specific circumstances of any mistep in procedure?

The Third Circuit's reliance on *Poole* [30] is likewise, inappropriate, according to the Third Circuit's own analysis. In the instant case, the Third Circuit plainly stated that a separate motion had to be filed and made no references to the Petitioner's documents. This is a clear designation of jurisdictional attributes to motions in FRAP. 4.

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[29] Arai v. American Bryce Ranches Inc., *316 F.3d 1066* (9th Cir. 2003).

[30] Poole v. Family Court of New Castle County, (368 F.3d 263, 267-68 (3rd Cir.2004).

In *Poole* [31] , however, the Third Circuit qualified its ruling:

> After *Poole* [32] was formally informed by the Third Circuit Court that his case could be dismissed on juridictional grounds, Poole, with his counsel, provided the Third Circuit with an explanation of the circumstances surrounding Poole's tardy receipt of the court order; the Third Circuit, however, in its Opinion, discounted Poole's explanation and wrote "It is simply asking too much of the district court clerk to note that the address listed on the April 1 letter was different from the address that Poole had previously provided." The Third Circuit *failed to cite even one reason for the dismissal of the Petitioner's appeal from the specifics of her case.*
>
> In addition to discounting Poole's delayed filing explanations, the Third Circuit also found Poole's actual "Notice of Appeal" to be "simple", and thus, deficient. In *Poole* [33] the Third Circuit also cited *Campos v. LeFevre*, 825 F.2d 671, 676 (2ndCir. 1987) and wrote "While no particular form of words is necessary to render a filing a 'motion', a simple notice of appeal does not suffice."[34] What was the Third Circuit's analysis of the Petitioner's specific filings?

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[31] Id.

[32] Id.

[33] *Poole v. Family Court of New Castle County*, (368 F.3d 263, 267-68 (3rd Cir.2004)

[34] Id.

Poole's case differed from the instant case in one additional way:

- Poole filed his notice of appeal on 05/13/2002, from an order entered on 03/28/2002. The Third Circuit sent Poole the letter for possible dismissal due to jurisdictional defects on 05/20/2002 - 7 days after the filing of the appeal.
- The Petitioner filed her notice of appeal on 12/18/2009, from an order entered on 08/19/2009. The Third Circuit sent the Petitioner the letter for possible dismissal due to possible jurisdictional defects on 01/09/2009, 22 days after the filing of the appeal.

Poole had been apprised of a possible jurisdictional defect well within the time limits indicated under FRAP 4., while the Petitioner received such notice after the time limits had long past.

The Petitioner, however, does not request this Court to excuse any error based on the Petitioner's status as a pro se litigant. In this respect, the Petitioner does not rely on the Third Circuit's "tardy" notice for possible defects to plead her case. The Petitioner relies, instead, on the fact that the Third Circuit entered an appeal on the docket on 01/05/2010, when the appeal - based on the Third Circuit's application of FRAP 4. - was no longer appealable.

THE QUESTION PRESENTED IS OF EXCEPTIONAL IMPORTANCE

If all of the elements of FRAP 4. are to be considered as statutory "claim processing" elements then appeals filed "out of the jurisdictional limitations" should be immediately dismissed, whereby providing appellants the possibility of *promptly* amending their appeals for resubmission. If this Court decides that all of the elements of FRAP 4. can be reduced to statutory "claim processing" ones, the verification of compliance with these rules is a very elementary one. Consequently, the question of the jurisdictional nature of FRAP 4. is at issue here as well as the question of how courts of appeals regulate the docketing of appeals.

In 2009, of the 57,740 cases terminated in the United States Court of Appeals, 28,029 (approximately one-half) were dismissed as "Procedural Terminations".[35] Based on current costs for filing an appeal, this amounts to more than $10,000,000 - monies not well spent on justice, but instead wasted on the review by judges of what the Third Circuit Court judges in the instant case have defined, by their dismissal, as jurisdictional claim-processing rules. **The Third Circuit Judges dismissed the instant case for lack of jurisdiction despite the fact that an**

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[35] http://www.uscourts.gov U.S. Court Of Appeals - Judicial Caseload Profile – National Totals.

appeal had indeed been filed on 12/18/2009, under the circumstances described herein.

This certainly cannot be deemed as "promoting judicial efficiency" - the phrase this Court adopted when it cited Bowles in John R. Sand & Gravel Co. v. United States, 552 U. S. 130 (2008).

THE DECISION OF THE THIRD CIRCUIT CONFLICTS WITH THE HOLDINGS OF OTHER COURTS OF APPEALS

In conflict with other courts of appeals that have considered the issue of "jurisdiction", specifically with regard to FRAP 4, the Third Circuit's decision in the instant case unequivically confers a jurisdictional character on all of the elements of FRAP 4. The Third Circuit has appropriated too much authority in divesting itself of jurisdiction, thus ridding itself of the onus of having to provide any type of review.

In *Garland v. Olivarez*, 40923, (5th Cir.2003), the Fifth Circuit Court dismissed the appeal for lack of jurisdiction. It affirmed, however, that "Even if this court construed Garland's notice of appeal to be a motion to reopen the time to file an appeal, the motion would be untimely... Garland's motion was not filed within the 180 days after the entry of judgment or within seven days of his learning of the entry of judgment, FRAP 4.(a)(6)(A)." *Thus, the Fifth Circuit Court affirmed*

that if the motion had been filed within that time it could have contrued a "notice of appeal" as a "motion to reopen". ***This reaffirms the holding among the courts that the effective purpose of the procedures under FRAP 4. is to ascertain that the conditions are met and not that the mere procedures are followed.***

In *McCormack Lines v. International Terminal Operating Co., Inc.*, 784 F.2d 1542 (2nd Cir.1986)), the Second Circuit Court accepted the notice of appeal filed in district court in lieu of the petition to appeal required under Section 636(c)(5) of 28 U.S.C., which "did not [even] state Mormac's specific objections to the judgment...", The Second Circuit Court allowed the petition to be filed nunc pro tunc and cited this Court as follows "Normally the Circuit Court of Appeals would be wholly justified in treating the mere filing of a notice of appeal in the District Court as insufficient. But the defect is not jurisdictional in the sense that it deprives the court the power to allow the appeal...", **thus clearly assigning and not divesting the court of jurisdiction**. The D.C. Circuit Court added that "Where we have no reason to doubt the bona fides of the petitioner and there is no indication of dilatory tactics, or prejudice to the respondent, or a frivolous appeal, we will normally allow the petition to be filed, especially where the petitioner comes forward with a reasonable explanation for the failure to follow proper procedure."

In *Feuvers v. United States*, 3065, 99-3071 (D.C.Cir.1999) the D.C Circuit Court dismissed the appeal, but it reasoned that Fuevers's "motion for the determination of status" did not even "mention the word "appeal" from which the district court could have concluded a Rule 4 (a) (6) request was before it." In Feuvers *the district court did indeed receive a "motion", albeit one which did not specify the appropriate relief sought; the D.C. Circuit Court affirmed, however, that had it received a document which at least "mentioned" the word "appeal", it could have decided favorably.* The Petitioner's filing of December 18, 2009, was certainly an appeal, and it was filed within the time limitations of FRAP 4.(a)(6).

In *United States v. Rhonda Fleming*, 20154 (Cir.5th 2009), the Fifth Circuit affirmed the lower court's decision , but only after it had presented every argument for the favorable consideration of the appellant's case. These arguments included contruing a Rule 60 motion as a Rule 59 motion so that a seemingly untimely notice of appeal could then be deemed timely. Unfortunately, for the appellant, all of these constructions failed to successfully plead her position due to the underlying substantive elements of the case.

In *Big Top Koolers, Inc. v. Circus-Man Snacks, 528 F.3d 389 (Cir. 11th 2008)*, the Eleventh Circuit affirmed the lower court's decision in denying the appellant's Rule 60 motion. It reasoned that the only vehicle for relief available to the appellant would have been an appeal under FRAP 4. Its line of logic, however, did not involve an analysis of the

specific words of Rule 60 as opposed to the words of FRAP 4. It involved, instead, the underlying motivations defined in these rules – the substantive differences and not those of form. Consequently, the Eleventh Circuit ruled that it could not equate a Rule 60 motion as a motion filed under FRAP 4.

In the instant case, the Third Circuit did not present any analysis. It superficially denied the appeal of the Petitioner, on jurisdictional grounds, since a separate motion had not been filed to reopen the time to appeal. In doing so, it also effectively declined "a priori" to construe any documentation submitted by the Petitioner as the equivalent of a motion to reopen under FRAP 4.(a)(6) regardless of the fact that the Petitioner's appeal was filed on 12/18/2009. This runs contrary to the decision of this Court in *Bowles*, since the Petitioner, according to that ruling, had filed her appeal within the "jurisdictional" time limitations under FRAP 4.

CONCLUSION

If the Third Circuit lacked jurisdiction, due – as it asserts - to the absence of a separate motion to reopen the time, then there was no effective means to remedy this "defective" appeal under FRAP 4. from its very docketing.

The Petitioner filed an appeal on 12/18/2009, which was docketed on 01/05/2010 - when the time limits under FRAP 4. had already expired; without considering the merits of that document and based solely on the

time limits under FRAP 4., the Petitioner's appeal could have been deemed as timely. In its dismissal of the appeal, the Third Circuit refused to review the merits of any documentation and replied exclusively, albiet erroneously, on this Court's ruling in *Bowles* and its own ruling in *Poole*. Since it did so, leaving no further consideration of the case other than "jurisdictional" limitations, the review before this Court is whether a court of appeals has the authority to divest itself of jurisdiction in this manner after having created a scenario that was without a solution.

Based on the foregoing, this Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

By: /s/ Suzanne Venezia 05/28/2010
SUZANNE VENEZIA (pro se)
318 WEST WALNUT STREET
NORTH WALES, PENNSYLVANIA 19454
(215) 704-0702 S.VENEZIA@VERIZON.NET

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

SUZANNE VENEZIA,

PETITIONER

V.

WILLIAM PENN SCHOOL DISTRICT,

RESPONDENT.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A4 – Order Dismissing Complaint. No. 4713 (2006) U.S.District Court for the Eastern District of Pennsylvania 8

Appendix A1 – Order Denying Petition For Rehearing No 1060 (3d. 2010)

Case 10-1060 Document: 003110038664 Page: 1
Date Filed 03/01/2010
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

No. 10-1060

SUZANNE VENEZIA,
Petitioner
v.
WILLIAM PENN SCHOOL DISTRICT

SUR PETITION FOR REHEARING

Present: SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges)

The petition for rehearing filed by Petitioner, Suzanne Venezia, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

Appendix A1 - Order Denying Petition For Rehearing No. 1060 (3d. 2010)

service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

s/s Dolores K. Sloiter
Circuit Judge

Dated 1 March 2010

Appendix A2 - Order Dismissing Appeal. No.1060 (3d. 2010)

Case 10-1060 Document: 00319998622 Page: 2
Date Filed 01/27/2010

SUZANNE VENEZIA,

v.

WILLIAM PENN SCHOOL DISTRICT

C.A. No. 10-1060
Page 2

ORDER

Appellant seeks to appeal the District Court's 12/15/06, order dismissing her complaint and 08/19/09, order denying her motion to reopen the judgment. Appellant's notice of appeal was not filed until 12/18/09, beyond the applicable 30-day periods for filing an appeal. See FRAP 4(a)(1)(A). Because the time requirement for filing a notice of appeal is mandatory and jurisdictional, Appellant's appeal is dismissed for lack of jurisdiction. Bowles v. Russell, 551 U.S. 205, 209 (2007). Appellant is unable to satisfy the time requirements of Federal Rule of Appellate Procedure 4(a)(5) for extending the time to appeal. Although Appellant asserts that she timely filed her notice of appeal for purposes of Federal Rule of Appellate Procedure 4(a)(6), that rule requires the filing of a motion to reopen the

time to appeal and the time to file such a motion has passed. See FRAP 4(a)(6); Poole v. Family Court of New Castle County, 368 F.3d 263, 267-68 (3d Cir. 2004).

By the Court,

A True Copy

s/s Dolores K. Sloiter
Circuit Judge

s/s Marcia M. Waldron, Clerk

Dated: 27 January 2010

Appendix A2 – Attachment -No.1060 (3d. 2010)

ALD-103 JANUARY 22, 2010
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT

C.A. No. 10-1060

SUZANNE VENEZIA,
Appellant
v.
WILLIAM PENN SCHOOL DISTRICT
(E.D.Pa.Civ.No.06-cv-04713

Present: SLOVITER, AMBRO AND SMITH,
Circuit Judges

Submitted are:
(1) By the Clerk for possible dismissal due to untimeliness;
(2) Appellant's response filed January 9, 2010;
(3) Appellant's concise summary of the case; and
(4) Appellant's letter filed January 11, 2010
in the above-cationed case.

Respectfully,

Clerk

MMW/JLR/jw

Appendix A3 – Order Denying Motion to Reopen No. 4713 (2006) U.S.District Court for the Eastern District of Pennsylvania

Case 2:06-cv-04713-JS Document 16 Filed 08/21/2009 Page 1 of 1

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

SUZANNE VENEZIA : CIVIL ACTION
NO. 06-4713

v.

WILLIAM PENN SCHOOL DISTRICT

ORDER

And now this 19th day of August, 2009, Venezia's Motion to Reopen[1] (Document 13) is DENIED because it was received more than one year after the final judgment dated December 15, 2006, in violation of Federal Rule of Civil Procedure 60 (c)(1).

BY THE COURT:

/s/ Juan R. Sanchez J.

[1] Although Venezia titled the document filed on August 6, 20009, as a "Statement of Intent to Proceed," the Court will treat the document as a Motion to Reopen a Judgment.

Appendix A4 – Order Dismissing Complaint. No. 4713 (2006) U.S.District Court for the Eastern District of Pennsylvania

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

SUZANNE VENEZIA : CIVIL ACTION
NO. 06-4713

v.

WILLIAM PENN SCHOOL DISTRICT

ORDER

And now this 15th day of December, 2006, Defendant's Motion to Dismiss (Document5) is GRANTED with prejudice. Judgment in the above-captioned case is entered in favor of Defendant William Penn School District and against Plaintiff Suzanne Venezia. The Clerk isdirected to mark the case closed for statistical purposes.

BY THE COURT:

/s/ Juan R. Sanchez J